United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original with affidavit of Mailing

75-1318

B P/S

To be argued by
DAVID A. DEPETRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1318

UNITED STATES OF AMERICA,
Appellee,

—against—

RICARDO E. INNISS and GERTRUDE McLENAN,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Eastern District of New York.

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Assistant United States Attorneys,
Of Counsel.

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TABLE OF CASES

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Preliminary Statement

This is an appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York (Judd, *J.*), after a jury trial which convicted appellants of a conspiracy between February, 1974 and June, 1974 to import and distribute substantial quantities of cocaine (Count One; T. 21, U.S.C. § 846 and § 963). In addition, appellants Inniss and McLenan were convicted of possessing with intent to distribute one kilogram of cocaine (Count Three; T. 21 U.S.C. § 841(a)(1) and T. 18 U.S.C. § 2). Finally, appellant McLenan was also convicted of importation of one kilogram of cocaine (Count Five; T. 21 U.S.C. §§ 952(a), 960(a)(1) and T. 18 U.S.C. § 2).[1] Appel-

[1] Roberto Alvarez, a fugitive, was also charged as a defendant in Count One (conspiracy) and in Counts Two and Four with a violation of T. 21 U.S.C. § 959 (distribution of cocaine outside the United States, knowing that said cocaine would be imported into the United States).

lants Inniss and McLenan were sentenced on August 1, 1975 to eight years imprisonment and a special parole term of five years to run concurrently on each count. Appellant McLenan was released pending appeal. Inniss is incarcerated.

The following contentions are raised on this appeal:

(1) both appellants argue that the trial court abused its discretion in allowing the testimony of Douglas Welch, a drug dealer, in rebuttal, (2) appellant Inniss argues that he was denied the effective assistance of counsel when Ira London, Esq. withdrew as his counsel in the face of an untenable conflict, (3) appellant McLenan argues that the Government's summation was prejudicial, and (4) appellant Inniss argues that there was insufficient evidence to convict.

Statement of Facts

A. The Government's Case

Appellants were charged with and convicted of a conspiracy to import and distribute cocaine between February and June, 1974 and also various substantive transactions during the tenure of the conspiracy. The role or function played by each of the appellants who were partners in this operation can be described as follows: McLenan was the financier and supervisor of the importation operation and Inniss was the distributor of the cocaine in the United States.

The evidence offered at the trial of appellants included, among other things, (1) the testimony of a courier employed by appellants in the operation, Manuela Canate (j)(2) documents corroborating the travel of appellants and Canate to and from South America; (3) the testimony of Douglas Welch as to his purchasing cocaine

from appellants; and (4) a seizure of cocaine from the June, 1974 importation.

Manuela Canate, the chief Government witness, testified that in February, 1974 appellants Inniss and McLenan[2] came to Panama for the carnival.[3] While there,[4] McLenan introduced Inniss to Canate and asked Canate if she knew anyone who could get cocaine in Columbia (T. 51, 54, 171).[5] Canate contacted her cousin, Maria Fernandez, who advised that Roberto Alvarez could supply cocaine. Based on this information, Inniss, McLenan, Canate and another woman, Cecelia de Leon, travelled to Barranquilla, Columbia (T. 56-60).[6] Upon arriving in Barranquilla, Columbia they rendezvoused with Maria Fernandez who took them to Cartegena to meet Alvarez, the source for the cocaine. Alvarez delivered a sample of cocaine to Inniss and McLenan, whereupon Inniss tested it (T. 62-67).[7]

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[2] Canate had grown up with McLenan in Panama. They maintained contact by mail after McLenan moved to the United States and saw each other whenever McLenan was in Panama.

[3] Government Exhibit 31, appellant Inniss' passport, corroborated his entry into Panama. Appellant McLenan had allegedly lost her passport and thus it was not available for the trial.

[4] Canate testified that McLenan and Inniss stayed at the Hotel Caribe while in Panama. This was corroborated by the hotel records (Government's Exhibit 28) which showed two people in a room registered to Gertrude McLenan.

[5] References to "T" are to pages of the trial transcript.

[6] McLenan, in exchange for Canate's help, offered to pay Canate's and de Leon's travel expenses to the United States and, of course to assist in smuggling them in. The travel on March 6, 1974 from Panama to Barranquilla, Columbia was corroborated by the Copa flight manifest (Government's Exhibit 27) and also by Canate's and Inniss' passports (Government's Exhibits 10 and 31, respectively).

[7] An agent of the Drug Enforcement Administration testified that the method of testing utilized by Inniss (rubbing a portion of the cocaine on his gums to see if they became numb) was one which many narcotics dealers use (Tr. 343-344).

The following day Alvarez returned with a large quantity of cocaine and Canate and de Leon proceeded to place it in the false lining of a travel bag while Inniss and McLenan remained with Alvarez (T. 67-68).[8] The foursome later went to the Mexican Embassy in Cartegena, Columbia to obtain visas to travel to Mexico. The plan was that they would smuggle the cocaine into the United States through Mexico and Canate and de Leon would cross the border at night (T. 70-72).[9]

After obtaining the visas and airline tickets, Inniss, McLenan, Canate and de Leon flew to Mexico City,[10] Canate carrying the cocaine in the travel bag. Once in Tijuana, Inniss and McLenan tried to find someone to help Canate and de Leon cross the border. Appellants crossed the border and registered at the Toreodor Hotel which was to be the rendezous point on the United States side. Canate and de Leon crossed the border illegally

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[8] Canate did not see any money being paid to Alvarez by Inniss and McLenan. However, she did not remain in the same room the entire time Alvarez was with Inniss and McLenan. Just prior to leaving the United States for Panama, McLenan had withdrawn approximately $12,000 from her account at the Manufacturers Hanover Trust Company (Government's Exhibits 38, 39, 40). An agent of the Drug Enforcement Administration testified that in his expert opinion, the price for a kilogram of cocaine in 1974 in Columbia was approximately $5,000 to $6,000. (Tr. 334). Appellant McLenan testified that of the $12,000 she withdrew from the bank, she loaned $7,500 to her former employer who owned a bar. (T. 458-461, 525-527, 578-581).

[9] Government's Exhibits 3-6 were certified copies of the visa applications of the foursome from the Mexican Consulate showing that the visa applications were made on March 11, 1974 and that they were made in succession. Appellant McLenan testified that she did not go to the Consulate with Canate and de Leon. (T. 466-467).

[10] Government's Exhibit 21, an Avianca flight manifest, showed the four travelled from Columbia to Mexico City on March 13, 1974.

with the help of a man Inniss and McLenan found (T. 73-82).[11]

Thereafter, the four proceeded to Los Angeles where McLenan, Canate and de Leon boarded a plane for New York with the cocaine while Inniss went back to Panama (T. 83-85).

Inniss arrived in New York approximately one week later, came to McLenan's apartment and took the entire shipment of cocaine. A few days later, Inniss returned with smaller clear plastic packages of cocaine. Inniss would take them a few at a time and meet with different men in the street near 649 Sterling Place.[12] He also had conversations with McLenan during the one or two weeks in which this took place (86-96, 106-107).[13]

In May, 1974 appellant McLenan received a communication that her mother in Panama was ill. So she returned to New York from her job on a ship before going

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[11] Government's Exhibit 20, a registration card for the Toreodor Hotel, showed that on March 15, 1974 Inniss registered with another person. The address used was 649 Sterling Place, Brooklyn, N.Y. which was where McLenan lived. Further, Government's Exhibits 22A and 22D, portions of appellant McLenan's address book which was seized at the time of her arrest, showed an entry for the Toreodor Hotel and a notation as to whom to contact to cross the border at Tijuana.

[12] Canate testified that one of the individuals with whom she saw Inniss meet was Douglas Welch (T. 97, 99). Welch testified in rebuttal that he had purchased cocaine from both Inniss and McLenan.

[13] An agent of the Drug Enforcement Administration testified that the smaller packages were the size that an ounce of cocaine would be in and that the value of such quantity was from $1300-$2200 (T. 335-336). Government's Exhibits 41-44, deposit slips for appellant McLenan's bank account, showed that almost $7500 in cash was deposited in her account on April 2, 1974, April 3, 1974, April 9, 1974 and April 22, 1974.

to Panama. However, McLenan did not leave for Panama immediately but rather waited a few days in New York until she could find Canate to arrange for another shipment again utilizing Canate as a courier. Canate agreed but the problem was that she had no papers to re-enter the United States. McLenan told her not to worry and within a day or two Inniss brought a birth certificate in the name of Johanna Marie Perez (T. 107-114).[14] McLenan then purchased airline tickets for herself and Canate (in the name of Perez).[15] On May 26, 1974, McLenan and Canate (traveling under the name of Perez) flew to Panama where they contacted Maria Fernandez. McLenan gave Fernandez money in 10's, 20's and 50's for the transaction and was to meet Canate in Panama after the transaction was completed in Columbia (T. 114-117).

Fernandez and Canate then flew to Columbia where they consummated the cocaine transaction with Roberto Alvarez. Canate then returned to Panama and rejoined McLenan (T. 117-122).[16] McLenan and Canate then flew from Panama to Mexico City and then on to New York. When they arrived at Kennedy Airport, McLenan

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[14] Government's Exhibit 9, the New York City birth certificate in the name of Perez, was seized from Canate when she was arrested at Kennedy Airport with a kilogram of cocaine concealed within the lining of her travel bag. Agent Edgar Adamson of the U.S. Customs Service testified that on February 16, 1972 he stopped appellant Inniss and a Johanna Marie Perez with the same date of birth as contained on Exhibit 9 and the same date on the vaccination document in the name of Perez (Government's Exhibit 12) (T. 323-326).

[15] Laura Seale, the owner of the Seale Travel Agency, testified that appellant McLenan purchased the tickets on May 25, 1974 for $788 cash (Government's Exhibits 33-37) (T. 385-389).

[16] This trip was corroborated by Canate's passport (Government's Exhibit 10) and the airline ticket seized from Canate which showed the travel from Panama to Columbia and return (Government's Exhibit 15).

passed through customs first and cleared but Canate was arrested when the cocaine was discovered (T. 122-125).[17]

B. The Defense Case

Appellant Inniss offered no defense.

Appellant McLenan testified, among other things, that she did not know that Canate was transporting cocaine to the United States on the two occasions to which Canate had testified. Further, McLenan stated that she did not know Maria Fernandez or Roberto Alvarez and that she had not discussed or received cocaine from them. McLenan also testified that she had never discussed cocaine with appellant Inniss. When asked about Douglas Welch, a narcotics dealer, McLenan stated that while she had heard of him she knew him only slightly and he had never been to her house which was at 649 Sterling Place, Brooklyn, New York. McLenan admitted hiring Ira London, an attorney, to represent Canate after she had been arrested but stated that this was at the request of Canate's sister (T. 447, 481, 491-492, 497, 507, 531-532, 536-538, 542,543, 586-587).

McLenan called Ira London, Esq. as a witness and he testified that McLenan had asked him to represent Canate because the latter's relatives and friends were

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[17] Seized from Canate when she was arrested were various documents including her address book with McLenan's address contained therein (Government's Exhibit 16) and her Customs deck in the name of Johanna M. Perez with an address of 655 St. John's Place, Brooklyn, N.Y. (Government's Exhibit 11). This address is where appellant Inniss lived. Canate testified that McLenan had told her to put down that address (T. 125). After her arrest, Canate was visited at the jail by an attorney, Ira London, who told her that appellant McLenan had hired him to represent her. When Canate decided to cooperate, she obtained another lawyer (T. 134-137).

concerned about her. London testified that Canate, when asked by him, said that two individuals other than appellants were involved in the importation and distribution of the cocaine. Further, London said he asked Canate if McLenan was involved and Canate replied negatively, stating that it was a coincidence that she and McLenan were on the same plane from Mexico to New York, and that they did not talk during the flight.[18] London further testified that Canate never mentioned appellant Inniss being involved with the cocaine. London also stated that at one time he had represented Inniss in the instant case and that the reason why he was not representing Inniss at the trial was that he had wanted to be removed since he had also represented Canate (T. 618, 623-624, 626-627, 629-631).

C. Rebuttal

In rebuttal, the Government called Douglas Welch who testified as to various cocaine transactions he had with McLenan and Inniss in 1973 and 1974. Welch purchased cocaine on several occasions from both appellants near McLenan's house on Sterling Place in Brooklyn in 1973. On some occasions he would receive it from Inniss and on others from McLenan. The same routine occurred with the payment for the cocaine (T. 674-675), 677-684). In February, 1974, Welch saw both appellants in Panama and McLenan asked him if he knew of a way for some people to cross the border from Mexico to the United States. Welch told McLenan where to go in Tijuana to obtain assistance (T. 684-686). Welch saw

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[18] Even McLenan's testimony contradicted the statement that Canate and McLenan met by coincidence on the flight from Mexico to New York on the second trip (T. 492-494). The obvious inference was that when Canate did not name McLenan as being involved to London but rather made up two individuals Canate was at that time protecting McLenan.

appellants in Brooklyn in late March and early April, 1974 and purchased cocaine from them (T. 687-688, 690-692). On one occasion in this time period after Welch ordered a quantity of cocaine from appellants, Canate delivered it (T. 692-693).

POINT I

The trial court did not abuse its discretion in allowing the testimony of Douglas Welch in rebuttal.

Both appellants argue that the trial court erred in allowing Douglas Welch to testify that he had purchased cocaine from appellants in 1973 and also in March, April and the summer of 1974, the latter period being during the course of the conspiracy. This argument by appellants is absolutely without merit.

Welch's testimony certainly would have been admissible in the Government's direct case for two reasons. First, Canate had identified Welch as being one of the people with whom she saw Inniss meet in the street when Inniss had the smaller packages of cocaine. Welch testified that he had seen appellants in Panama in February, 1974 and had told them who to contact in Tijuana to get someone across the border illegally [19] and he further testified to cocaine transactions with appellants during the course of the conspiracy. Thus, this testimony was both relevant and material to the very conspiracy for which appellants were on trial. Second, Welch also testified to other cocaine transactions with appellants in 1973. This would have been admissible as prior similar acts on the issue of knowledge and

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[19] Canate and de Leon entered the United States illegally through Tijuana within a month of this conversation with the help of Inniss and McLenan.

intent. *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967).[20]

It is obvious from the record that the reason this witness was not called in the Government's direct case was that he was reluctant to testify in open court. Welch had to be arrested on a material witness warrant and ordered to testify under a grant of immunity. The fact that he was called in rebuttal after he had been located is not, it is submitted, a basis for finding an abuse of discretion by the trial court when the testimony was so clearly relevant to the issues presented in this case. *United States* v. *Trapnell*, 495 F.2d 22 (2d Cir.), *cert. denied*, 419 U.S. 851 (1974).

Further, this testimony was admissible to impeach McLenan's testimony. McLenan testified that she was unaware that Canate was transporting cocaine from Columbia to the United States and that she (McLenan) never dealt in drugs. McLenan further testified that she had never had conversations with Inniss or Canate concerning cocaine and that she knew Welch very slightly but that he had never been to her house (T. 481, 507, 531, 537). Clearly, Welch's testimony was admissible to impeach McLenan's testimony as to her relationship with Inniss, Welch and narcotics. Further, the testimony by Welch as to the cocaine transactions demonstrated that McLenan and Inniss were partners and that they had interchangeable roles in the cocaine business (T. 677-687, 689-693).[21]

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[20] For the most recent cases on similar acts, see *United States* v. *Chestnut*, 2d Cir. Dkt. No. 75-1268 (March 8, 1976); *United States* v. *Santiago*, 2d Cir. Dkt. No. 75-1179 (January 12, 1976); *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 130 (2d Cir. 1975); *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975).

[21] On some occasions, Welch would purchase the cocaine from McLenan and pay Inniss and on others the reverse would occur.

POINT II

Appellant Inniss was not denied the effective assistance of counsel.

Various arguments are made on behalf of appellant, but they basically focus on one central issue: whether reversible error arises from the decision for appellant's original attorney, Ira London, to withdraw from representing appellant after he was advised of the possible conflict of interest and the fact that he might be called as a witness at appellant's trial.

The facts surrounding London's representation of Inniss were as follows: In June, 1974 Canate was arrested at Kennedy Airport in possession of a kilogram of cocaine. While the court appointed counsel initially to represent her, in approximately August, 1974 London filed a notice of appearance on her behalf and the other attorney was relieved. Subsequent to Canate's plea of guilty, Canate decided to cooperate with the Government and requested that London be relieved and another attorney be appointed because she had not retained London. The court granted this request. Canate's cooperation resulted in the indictment of appellants. On January 31, 1975 Inniss was arraigned on the instant indictment and London appeared as his attorney. Shortly thereafter, the Government advised the trial court of a potential conflict of interest as London had previously represented Canate and further advised that London would be a potential witness at Inness' trial on the question of who had retained London to represent Canate (Appellant's Appendix 7). At subsequent court appearances, the trial court continued to advise London and Inniss as to the potential conflict (cross-examination by London of Canate based on information received by him while representing Canate) and also the prejudice to

Inniss which might result if London, while representing Inniss, were called to testify as to whom had retained him to represent Canate (Appellee's Appendix A-1 - A-77). The trial court repeatedly requested London to file an affidavit or advise the Court as to whom had retained him to represent Canate. London never did file such an affidavit.

However, London did finally state to the court that Inniss had not so retained him (Appellee's Appendix A-80-A-81). In addition, London at one of the court appearances on the issue requested that he be given time to consult with another attorney to obtain another view on the question of whether he should withdraw as attorney for Inniss (Appellee's Appendix A-35, A-37, A-47 - A-48, A-53). London at a subsequent court appearance requested that the court allow him to withdraw from representing Inniss and be given time to find other counsel to represent Inniss. The court granted this request (Appellee's Appendix A-80 - A-83). At the next court appearance on the case Marvin Preminger appeared as counsel for Inniss and eventually represented Inniss at the trial.

It is submitted that the trial court's conduct with respect to this issue was entirely proper and necessary. Upon being advised as to the potential conflict of interest, the trial court inquired of both London and appellant Inniss as to the possible problems. The right of a fair trial, as mandated by the Sixth Amendment, requires the court to balance and examine the probative value of all actions done for, with, by, or against the defendant with respect to the resulting undue prejudice which may arise. The court's inquiry was mandated by this Court's rulings. See, *e.g.*, *United States* v. *DeBerry*, 487 F.2d 448 (2d Cir. 1973). In addition, the court requested London to state who had retained him to represent Canate, since this information might prove relevant to the case as he was representing Inniss.

After London apparently consulted with another attorney as to the possible conflict and attendant question, he requested the court to allow him to withdraw. The court granted this request. That fact alone should be dispositive of this issue raised by Inniss; the court simply did not order London to relieve himself from the case. Compare, *United States* v. *Armedo-Sarmiento*, 2d Cir. Dkt. No. 75-1329 (October 10, 1975), wherein the defense objected to an order compelling withdrawal without the court giving defendant an opportunity to waive any conflict.

However, even assuming that the trial court had so ordered London, it is submitted that such action by the court would not have been an abuse of his discretion under the circumstances of this case. If Canate had not expressly waived her attorney—client privilege at the trial, London might, in an effort of extreme caution, have severely limited his cross-examination in order to avoid a possible violation of his former attorney—client relationship with Canate. Further, the prejudice which could have been created by Inniss' own attorney being called as a witness in the case as to any relationship between Inniss, McLenan and Canate was quite substantial. Thus, the trial court had a basis for finding that Inniss could not make a knowing and intelligent waiver on the question of conflict. See *United States* v. *Bernstein*, Second Circuit Docket No. 74-2328-29, 74-2462-64 (March 4, 1976), slip op. 6631, 6649-6651.[22]

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[22] It should be noted that appellant does not claim that his trial counsel was in any way incompetent or ineffective. Further, it would appear that the reverse issue would have been raised if London had not withdrawn from the case. Inniss would have argued that London should have been relieved and that he (Inniss) had not made a knowing waiver because of the prejudice that resulted with London as his trial counsel (London was called at the trial by Inniss' co-defendant, McLenan). See *United States* v. *McClean*, 2d Cir. Dkt. No. 75-1269 (January 13, 1976), slip op. 1507, 1521-22.

POINT III

Appellant McLenan argues that the Government's summation was prejudicial and requires a reversal.

Appellant McLenan first argues that an improper comment was made by the Government in its summation as to a debriefing statement which had been used by her counsel during the course of the cross-examination of Canate to impeach Canate's credibility. It is submitted that the Government's reference to this document when taken in context was entirely proper.

Appellant, in cross-examining Canate, utilized two or three sentences from a five page, single-spaced debriefing statement to point out minor inconsistencies from Canate's trial testimony in order to impeach her credibility. There can be no question but that Canate's credibility was a major issue in the trial. To that end, appellant devoted a major portion of his summation to attacking Canate's credibility (T. 922-950, 958). More specifically, appellant argued the inconsistencies between Canate's testimony at trial and those that she had made in the debriefing statement (T. 938-943).

In response, the Government in its summation argued its version of the facts and the reasons why the jury should believe Canate. Further, the Government argued that the inconsistencies which appellant pointed to concerned minor and insignificant details. Finally, the Government noted the testimony of the agent who debriefed Canate as to the length of the statement and the fact that it was single-spaced (T. 360-361). Based on the arguments made in the defense summation, it is submitted that it was fair comment to argue that if there had been other inconsistencies between the debriefing and Canate's

testimony at trial, that appellant would have cross-examined as to them. Finally, the trial court instructed the jury that they did not have to accept this argument, but could draw an opposite inference (T. 1039).

Appellant McLenan next argues that the Assistant United States Attorney committed reversible error by commenting on the fact that Welch had been a reluctant witness. Both appellants spent considerable time cross-examining Welch as to his prior convictions and arrests in this country and elsewhere as well as to his narcotics trafficking in an effort to impeach his credibility. Further, appellants spent a substantial portion of their summations arguing that Welch was a "liar," among other things. Welch testified that he had been arrested on a material witness warrant in connection with this case and had been ordered to testify by the trial court under a grant of immunity (T. 667-668).

The comment made by the Government in its closing argument must be read in the context of the witness Welch's situation. Welch was not only a witness with several prior arrests and convictions, but also was an admitted narcotics violator. The Government commented on the manner in which this witness was called to testify. He had been compelled to appear in court as a witness in this case having been arrested on a material witness warrant and had been ordered by the trial court to testify. Obviously, Welch was a reluctant witness in view of these circumstances. The Government at no time argued that Welch had been threatened by appellants or anyone else. What the Government did was suggest to the jury a reason why Welch had to be arrested as a material witness and ordered to testify by the court (that is, because he was a narcotics dealer and by testifying in court he would be exposing himself as an informer thereby losing his anonymity. It is submitted that this argument by the Government was fair and proper under the circumstances.

See United States v. *DeAngelis*, 490 F.2d 1004 (2d Cir. 1974).[23]

Finally, appellant McLenan urges that error was committed when the Government argued that appellant did not call as a witness an individual who could allegedly have corroborated her testimony as to what she had done with a $7,500 withdrawal just prior to leaving for South America where the cocaine was purchased. It is submitted that this argument was fair comment based on the circumstances of this case. The Government had offered evidence that just prior to appellant leaving for Panama to purchase cocaine, she had withdrawn approximately $7,500 from her bank account, the inference being that at least a portion of this money was to be used as payment for the cocaine. Further, an agent of the Drug Enforcement Administration testified that the price of a kilogram of cocaine in Columbia in 1974 was between $5,000 and $6,000. Appellant testified that she withdrew this money to loan it to a friend and former employer, a Hugh Beresford. She alleged that the loan was for $7,500. Appellant further testified that she had known this individual for a substantial period of time and that he was a partner in a bar in Brooklyn, New York. Finally, she stated that she had worked for Beresford at the bar. As to the deposits made in her bank account in April, 1974 (four different cash deposits in 5's, 10's, 20's, and 100's totaling $7,350), appellant claimed that these represented the repayment of the loan to Beresford (T. 458-461, 525-527, 578-581). It was the Government's contention that these deposits were a portion of the pro-

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[23] However, assuming that this Court should find that this statement in the closing argument by the Government was improper, then it is submitted that it does not rise above the level of harmless error in view of the overwhelming evidence against appellant.

ceeds from the sale of the cocaine by appellant after the first shipment had been imported.

Appellant in testifying raised the question concerning the disposition of the money. She testified to a particular relationship with Beresford. The Government, in commenting on appellant's failure to call Beresford as a witness, noted for the jury that both appellant and the Government had the right of subpoena and also that a witness might be equally available to both sides. Further, the trial court instructed the jury that appellant had no obligation to produce any witnesses (T. 1041-1042). In view of the peculiar relationship of appellant to Beresford, it is submitted that it was fair comment for the Assistant United States Attorney to raise this issue for the jury. *See United States* v. *DiBrizzi*, 393 F.2d 642 (2d Cir. 1968). *Cf. United States* v. *Stofsky*, 527 F.2d 237 (2d Cir. 1975).

POINT IV

The evidence against appellant Inniss was sufficient to convict.

Appellant Inniss' argument that there was insufficient evidence upon which the jury could convict is frivolous. Not only was there the testimony of Canate and Welch as to their narcotic dealings with Inniss, but also several documents were introduced to show Inniss' involvement in the conspiracy. Inniss allegedly went to Panama in February, 1974 for the carnival but also to be with his father who was quite sick. Yet Inniss managed to leave Panama to go to Columbia for a week with McLenan, Canate, and deLeon (the place where he purchased and tested the cocaine) and then on to Mexico and California before returning to Panama. This travel was documented by airline and hotel records. Once he was assured that the cocaine was imported into the United States safely, then he returned to Panama. Finally, the

most devastating piece of evidence corroborating Canate's testimony concerning Inniss (and one which his attorney failed to explain in summation) was that of Agent Adamson who showed Inniss to have access to the same birth certificate which Canate utilized for the second shipment. Canate had testified that Inniss have given her this document to use in reentering the United States with the cocaine.

It must also be pointed out that Inriss did not object to the Court's charge (T. 1095-1097).[24] Furthermore, when read in the context of the entire charge, the trial court's remarks which appellant contests on appeal were not improper or erroneous.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: May 5, 1976

Respectfully submitted,
DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
DAVID A. DEPETRIS,
Assistant United States Attorneys,
Of Counsel.

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[24] However, appellant Inniss did argue that the trial court's statement that Canate had less motive to lie since she had already been sentenced and was to be deported was improper. Even assuming that said comment is deemed to be improper, in light of both the entire charge and the evidence adduced at trial, any error in the charge must be viewed as harmless. See *United States* v. *Bernbaum*, 373 F.2d 250, 257-258 (2d Cir.), *rehearing denied*, 375 F.2d 232, *cert. denied*, 389 U.S. 837 (1967).

★ U. S. Government Printing Office 1976— 614—353—206

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 10th day of May 19 76 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Stanley H. Meyer, Esq.
Preminger, Meyer & Light, Esqs.
66 Court Street
Brooklyn, N. Y. 11201

Herman Kaufman, Esq.
120 Broadway
New York, N. Y. 10005

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
10th day of May 19 76

Carolyn N. Johnson
CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618298
Qualified in Queens County
Term Expires March 30, 1977